Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HARRY BOWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

RANDALL J. TURK
Counsel of Record
SARA E. KROPF
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., NW
Washington, D.C. 20016
(202) 639-7700
Counsel for Petitioner

HENRY GONZALEZ
Attorney-at-Law
708 E. Jackson St.
Tampa, Florida 33602
(813) 221-2505

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QUESTIONS PRESENTED

1. Whether it was harmless error for the Government to introduce evidence of the racist policy of an organization of which the defendant was president when the Government did not charge any racially-motivated offenses and therefore the highly prejudicial racist policy was without any evidentiary value.

2. Whether the structural error standard under *Arizona v. Fulminante* should have been applied when the district court improperly admitted the Government's evidence of the racist views of the defendant's organization, and the defendant therefore did not voir dire potential jurors about their ability to judge him fairly in spite of his association with this organization.

RULE 29.6 STATEMENT

All of the parties to the proceeding are included in the caption of this case. No corporate disclosure is required under Rule 29.6.

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IN THE
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No. 02-_____

HARRY BOWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Harry Bowman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 302 F.3d 1228 (11th Cir. 2002), and is reprinted at Appendix A. The order denying

Petitioner's request for a panel rehearing is reprinted at Appendix B.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on August 20, 2002. On October 10, 2002, Petitioner filed a timely request for panel rehearing. The petition for panel rehearing was denied by order dated December 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . .be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State."

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Pretrial Matters

Harry Bowman was the international president of the Outlaws Motorcycle Club from 1984 to 1997. In 1997, Mr. Bowman was indicted in the Middle District of Florida on ten counts. The Government did not charge him with any racially-motivated or hate crimes. Indeed, the wrongful conduct charged arose out of the Outlaws' ongoing feuds with other motorcycle clubs such as the Hell's Angels. Four

counts in the indictment alleged violations of the Racketeer Influenced Corrupt Organizations Act ("RICO"). The overt acts associated with these counts included assault and conspiracy to murder. The remaining six counts in the indictment alleged drug offenses, destruction of a rival motorcycle organization's clubhouse and possession of a firearm as a felon.

In the introduction to Count One, the indictment stated that "[m]embership in the Outlaws Motorcycle Club was limited to white males." R1-1. Mr. Bowman objected pretrial to the inclusion of this statement. R1-47. He argued that the allegation of racism was irrelevant to the charges and was highly prejudicial. Id. During the hearing on this issue, the Government argued that the whites-only policy was support for its argument that the Outlaws was an "enterprise" under RICO. R7-40. Upon questioning the Government, however, the court discovered that none of the charges alleged conduct against African-Americans or other members of minority groups. R7-41. The court ultimately granted Mr. Bowman's motion to strike, stating:

> Well, assuming [the whites only requirement is] still a rule, even an unwritten rule, the question is why is it relevant if there is no crime against a black because of the rule? If your relevance is you need it to prove that there is an enterprise and this is part of the enterprise, you've got bylaws, you've got a hierarchy set up; you've got badges and indicia of membership. I just don't see how that particular element is relevant to any issue in this case *other than to just to try to inflame the jury.*

R7-41 (emphasis added); R7-43; R1-56 (written order).

During the pretrial hearing, while the court did not expressly forbid the Government from introducing during the trial the Outlaws' bylaws which included the whites-only policy, it did caution that it would entertain a relevance objection from the defense. if the Government sought to do so. R7-43-44.

Voir dire followed the pretrial evidentiary hearing. In light of the judge's pretrial order, defense counsel did not ask any questions concerning whether the potential jurors could judge a member of a group with racist opinions fairly and impartially. Defense counsel also permitted one African-American juror to be selected for the jury.

B. Evidence of the Outlaws' Racist Views Presented at Trial

During the trial, the Government repeatedly raised the Outlaws' racist policy throughout the trial. The Government's focus on this issue was not an isolated incident. The court admitted four separate documents during the trial that included this policy. These documents were published to the jury on an overhead projector, thus making the whites-only policy clearly visible to the jury. R10-177.

When the Government introduced the Outlaws' national constitution, Mr. Bowman objected and requested that, at a minimum, the first sentence – which included the whites-only policy – be redacted before being published to the jury. Defense counsel argued that there were not "any issues of race in this entire trial" and reminded the court of its pretrial ruling to strike similar language from the indictment. In a reversal from its pretrial ruling, however, the court permitted the introduction of the entire, unredacted document, explaining that "if it's a part of the constitution, it's a part of the constitution." Later in the trial, the Government introduced a copy of the Outlaws' national constitution seized at Mr. Bowman's house which included the whites-

only policy. Mr. Bowman again objected and requested redaction. R12-12. The Government objected to redaction of the constitution and stated that the Outlaws are a "racial organization." R12-12; *see also* R10-201 (introducing document that "members must be white"); R11-12-13 (introducing document that it is an "all white membership"). The court overruled the defendant's objections and admitted the unredacted documents.

Not only were the unredacted documents with the whites-only policy made a part of the record four separate times during the trial, but an FBI agent also called the jury's attention to the specific policy by testifying that the constitution "indicate[s] who can belong in the club." R10-177. Additionally, the Government called an FBI agent to testify as an expert on the Outlaws. When the defense objected to any testimony about the whites-only policy, the Government argued at sidebar that "it's a whites-only club. It is a racial organization." R12-145. Reversing itself yet another time, the court concluded that any expert testimony about the whites-only policy would have a prejudicial effect that outweighed its relevance, though the expert could testify about other matters. The court excluded the testimony of the whites-only policy, explaining that "right now there is nothing in this trial that I know of that would justify the prejudicial – overwhelming prejudicial nature of that one issue." R12-147.

In addition to the evidence about the whites-only policy, the Court admitted other evidence portraying the Outlaws as racists. First, over Mr. Bowman's objection, the Government introduced Nazi and Confederate flags seized at the Outlaws' clubhouse. R10-156. Second, the Government introduced evidence that some Outlaws wore "lightning bolts," which were Nazi-style "SS" tattoos. R14-90-92. Third, the Government introduced evidence that Mr.

Bowman had such a tattoo, in an attempt to link him to the racist views of the Outlaws. R14-92, R19-96-97, 161-64.

Mr. Bowman was convicted of eight of the counts in the indictment and was sentenced to life in prison.

II. DECISIONS BELOW

Mr. Bowman appealed his conviction to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291, raising three issues: (1) whether the evidence was sufficient to convict him; (2) whether the district court had abused its discretion in permitting an anonymous jury; and (3) whether the district court had abused its discretion under Rule 403 of the Federal Rules of Evidence in refusing to redact the whites-only policy in the Outlaws' constitution.

As to the third issue, the court agreed, reasoning that because Mr. Bowman "was not charged with any racially-motivated crimes, his allegiance to a racist organization is not relevant to his guilt or innocence." *United States v. Bowman*, 302 F.3d 1228, 1239 (11th Cir. 2002). The court concluded that given the other evidence that the Outlaws was an "enterprise" under RICO, the whites-only policy was cumulative, and its probative value was "limited" and "outweighed by the danger of unfair prejudice." *Id.* at 1240. The Eleventh Circuit thus held that it was error for the district court to have permitted the "injection of racial issues" and that it should have redacted the policy. *Id.* The court nonetheless concluded that this was harmless error after comparing the impact of this evidence to the other evidence against Mr. Bowman. *Id.*

Mr. Bowman petitioned for panel rehearing on this issue. This petition was denied by the Eleventh Circuit on December 23, 2002.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW IGNORED ESTABLISHED PRECEDENT IN HOLDING THAT THE ADMISSION OF EVIDENCE OF THE RACIST VIEWS OF THE DEFENDANT WHEN HE IS NOT CHARGED WITH ANY RACIALLY-MOTIVATED CRIMES IS HARMLESS ERROR

The court below committed error by holding that it was harmless error to admit evidence of the Outlaws' racist policies even where no racially-motivated crimes were charged. Other courts of appeals have repeatedly held that even under the harmless error standard, it is reversible error to admit evidence that is so inflammatory and irrelevant that it taints the entire trial, particularly where the evidence seeks to inflame racial prejudice. Indeed, in order for Mr. Bowman's conviction to be affirmed, this error must be harmless "beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

Plainly, the Government did not consider the evidence in question to be harmless. Throughout its presentation of the evidence in Mr. Bowman's trial, the Government sought every opportunity to remind the jury of the Outlaws' racist views. Indeed, this evidence was clearly an essential persuasive element of the Government's case against Mr. Bowman. The Government introduced documents showing the whites-only policy four separate times during the trial. It also offered evidence of the Nazi and Confederate flags found at the Outlaws' clubhouses and that some members, including Mr. Bowman, had Nazi-style tattoos. Furthermore, the Government's own explanation of the need for this evidence was that it would portray the Outlaws as a "racial organization." But the Government had not charged Mr. Bowman with any racially-motivated crimes and did not

introduce one shred of evidence that Mr. Bowman's personal views had anything to do with the charged offenses.

The Eleventh Circuit first correctly concluded that it was error for the district court to have admitted the whites-only policy under Rule 403 because this evidence was irrelevant to the charged crimes and would serve only to inflame the jury's passions against Mr. Bowman.

Rule 403 of the Federal Rules of Evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The evidence about the Outlaws' racist views is relevant only if it had "any tendency to make the existence of any fact that is of consequence to the determination of the action" more or less probable. Fed. R. Evid. 401. As the Eleventh Circuit's opinion noted, because Mr. Bowman "was not charged with any racially-motivated crimes, his allegiance to a racist organization is not relevant to his guilt or innocence." *Bowman*, 302 F.3d at 1239.

This conclusion is supported by the other Courts of Appeals which have consistently held that evidence of a defendant's racist views is irrelevant and should be excluded if racial animosity is not an element of the crime charged. *See, e.g., United States v. Magleby*, 241 F.3d 1306, 1319 (10th Cir. 2001) (holding that it was not error to admit testimony concerning racist song lyrics played by the defendant because it went to prove racial animus as required in cross-burning case); *United States v. Bonneau*, 970 F.2d 929, 934-35 (1st Cir. 1992) (holding that it was not

reversible error for the Government to introduce in a criminal tax evasion case a letter written to the IRS by the defendant that referred to the defendant's constitutional rights as a "free white male citizen" despite its racist "overtones" because it was relevant to an element of the offense); *United States v. McInnis*, 976 F.2d 1226, 1232 (9th Cir. 1992) (holding that in case where defendant was charged with using force to interfere with federal housing rights on the basis of race, it was not error to have admitted evidence including a Ku Klux Klan poster and a flashlight that was marked with a swastika and two lightning bolts because the evidence was "clearly relevant to establishing his racial hatred and that he acted on that hatred, *an element of the crime charged*.") (emphasis added); *United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990) (permitting evidence relating to the defendant's attempt to join a skinhead group in a cross-burning case because the "skinhead evidence tended to establish [the defendant's] racial animus and that he might act on his beliefs"); *United States v. Silverstein*, 737 F.2d 864, 866 (10th Cir. 1984) (holding that evidence linking the defendant to the Aryan Brotherhood prison gang because it established the defendant's motive to kill another prisoner who refused to follow the gang's orders).

The Eleventh Circuit properly concluded that it was error to admit the evidence of racism at Mr. Bowman's trial. But it went on to apply the harmless error standard incorrectly, ignoring this Court's admonition that such error must be harmless "beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. Even a cursory look at this evidence shows that it must have tainted the jurors' view of Mr. Bowman and encouraged a guilty verdict based on his association with the Outlaws rather than on his allegedly wrongful conduct. This was not a case where the Government introduced relatively innocuous evidence such as of Mr. Bowman's support for a particular political party in the next presidential election or

his views on universal health care. Rather, the Government sought to introduce the most inflammatory evidence possible, evidence of Mr. Bowman's racism. Nor was this an accidental isolated remark. Rather it was a carefully calculated effort by the Government to inflame the jury's passions against Mr. Bowman. Indeed, the very fact that the Government sought to introduce the evidence of the Outlaws' racism so frequently and that it argued for its admission so vehemently underscores that the *Government* clearly did not think that this evidence was harmless, much less harmless beyond a reasonable doubt. To the contrary, the Government obviously viewed this evidence as crucial to its case against Mr. Bowman.

The cases in which the courts of appeals have reversed criminal convictions because of evidence admitted in error under Rule 403 form a relatively limited category. There is not a bright-line rule for when evidence is so inflammatory that its introduction requires reversal. But the examples are stark: the defendant condones child molestation or wife-beating, is a homosexual, enjoys deviant pornography or, most important, is a racist.

For example, in *United States v. Ham*, 998 F.2d 1247 (4th Cir. 1993), *cert. denied*, 516 U.S. 986 (1995), the Fourth Circuit addressed a case in which members of the Hare Krishna religion were charged under RICO and mail fraud statutes. The government introduced evidence that one of the defendants was a homosexual, that he compared women to dogs and condoned "lightly slapping" one's wife for disciplinary reasons, and that he was the leader of a Hare Krishna community that had molested children. *Id.* at 1251-52. The Fourth Circuit explained that this evidence created a "fear that jurors will convict a defendant based on the jurors' disdain or their belief that the defendant's prior bad acts make guilt more likely." *Id.* at 1252. The child molestation allegation was particularly inflammatory, and a curative

instruction by the court was insufficient to correct the error. *Id.* at 1253. Because the admission of this "inflammatory evidence so infected" the defendant's trial, the Fourth Circuit vacated their convictions and remanded for retrial. *Id.* at 1254.

Similarly, at least one circuit court has held that the improper admission of evidence of the defendant's racism, which was unrelated to the charged offenses, requires reversal. *See, e.g., United States v. Kallin*, 50 F.3d 689, 691 (9th Cir. 1995) (reversing in part because government had elicited testimony in a criminal tax evasion case that the defendant disliked Mexicans and the prejudicial effect of this evidence "far outweighed any probative value" under Rule 403); *see also United States v. Harvey*, 991 F.2d 981 (2d Cir. 1993) (reversing conviction in child pornography case where government introduced evidence of adult pornography videotapes found in the defendant's house that depicted perverse sexual behavior including bestiality and sadomasochism because the material did not involve child pornography, "did not bear on any of the disputed trial issues" and bore a "substantial risk of inflaming the jury"); *United States v. Gillespie*, 852 F.2d 475, 478-79 (9th Cir. 1988) (reversing conviction for violation of federal statute prohibiting transportation of person in interstate commerce for illegal sexual purposes because the government introduced evidence of the defendant's homosexuality, and this evidence "neither proved nor disproved that the appellant molested the child" and was "extremely prejudicial").

Racism is a particularly offensive belief to most individuals. Indeed, evidence of an individual's racist views will have a "visceral impact that far exceeds [its] probative value." *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). Given the evidence presented in Mr. Bowman's trial–including the Nazi-style tattoos, the whites-only policy and

the Nazi and Confederate flags – it "does not take much imagination to understand" how such "grossly biased" views would be viewed by the jury. *Kallin*, 50 F.3d at 696 n.7. The racial composition of the jury is irrelevant to this inquiry, because "nearly all citizens find themselves repelled by such blatantly racist remarks and resentful of the person claimed to have uttered them." *Id.* The "only purpose of this evidence would be to prejudice the jury against" Mr. Bowman, and this unfairly prejudicial result is exactly what Rule 403 intends to prevent. *Id.* The court below entirely ignored the cases that have held that admission of irrelevant evidence of particularly inflammatory beliefs – such as condoning wife beating, child molestation or racism – requires reversal. It is asking too much of a jury to ignore this evidence, and this error cannot be said to be harmless "beyond a reasonable doubt." If the Government thought this evidence was merely "harmless," it would not have introduced it so frequently.

Furthermore, the Government also injected into Mr. Bowman's trial racial issues where no racially-motivated crimes were charged. This Court has held that the Constitution "prohibits racially-biased prosecutorial arguments," *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987), and the federal courts have sought for years to eradicate the effect of racism in the justice system. As the Eleventh Circuit noted, the Government "should have scrupulously avoided the possibility that the jury's verdict might be clouded by racial issues," and the court could have "prevented the injection of racial issues simply by redacting the whites-only policy." *Bowman*, 302 F.3d at 1240.

The court below again ignored the precedent of this Court and the other federal courts that the deliberate injection of racial issues violates a defendant's constitutional right to a fair trial and requires reversal.

For example, in *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990), the D.C. Circuit reversed the defendants' convictions of drug offenses because the Government introduced evidence through a police detective that Jamaicans conducted a substantial amount of the drug trade in the District of Columbia. Given the courts' "'unceasing efforts' to eradicate racial prejudice from our criminal justice system," *id.* at 21 (quoting *Batson v Kentucky*, 476 U.S. 79, 85 (1986)), "[a]ppeals to racial passion can distort the search for truth and drastically affect a juror's impartiality," *Id.* at 25. Because the prejudicial impact so outweighed any relevance of this testimony, the court held that it could not conclude beyond a reasonable doubt that the comments "did not contribute significantly to appellants' convictions" and reversed. *Id.* at 28.

Other courts have similarly reversed convictions where the Government injected racial prejudice into the proceedings rather than relying on relevant evidence. *See, e.g., United States v. Cabrera*, 222 F.3d 590, 596 (9th Cir. 2000) (reversing convictions of Cuban defendants because police officer's testimony making generalizations about Cubans and the drug trade prejudiced the defendants and "made it seem more likely in the eyes of the jury" that they were drug dealers); *United States v. Vue*, 13 F.3d 1206, 1213 (8th Cir. 1994) (reversing convictions of Hmong defendants because Government introduced testimony about high likelihood of opium drug dealers being Hmong and this injection of racial prejudice "invited the jury" to use racial prejudice in their deliberations, thus violating the Fifth Amendment); *United States v. Cruz*, 981 F.2d 659, 663-64 (2d Cir. 1992) (reversing convictions because "[i]njection of a defendant's ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial for reasons that need no elaboration here").

The court below erred by holding that the district court's admission of irrelevant evidence relating to Mr. Bowman's racist views was harmless error. None of this evidence was relevant and all of it had a "visceral impact" on the jury against Mr. Bowman, thus infecting the entire trial. Given the serious risk that Mr. Bowman's conviction was a result not of the relevant evidence offered against him but rather of the jury's dislike of his personal beliefs, the court below should not have concluded that the error was harmless beyond a reasonable doubt and this Court should clarify the harmless error standard for these types of cases.

II. THE COURT BELOW IGNORED THIS COURT'S HOLDING IN *ARIZONA V. FULMINANTE* THAT ERROR WHICH TAINTS THE FRAMEWORK OF THE ENTIRE TRIAL IS STRUCTURAL ERROR NOT SUBJECT TO A HARMLESS ERROR ANALYSIS

The court below ignored this Court's holding in *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), that where the error is a "structural error" that "affect[s] the framework within which the trial proceeds," the harmless error standard should not be applied. In *Chapman*, 386 U.S. at 827-28, this Court noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." In *Fulminante*, this Court elaborated on these types of structural errors, holding that they are errors "affecting the framework within which the trial proceeds." 499 U.S. at 310.

The Eleventh Circuit analyzed this issue briefly under the harmless error standard, concluding that the admission of this evidence did not require reversal. *Bowman*, 302 F.3d at 1240. However, the court never even *considered* whether the error may have affected a fundamental trial right so that the harmless error standard was inapplicable and the *Fulminante* structural error standard was the correct method

of analysis. The court below thus ignored this Court's precedent in both *Chapman* and *Fulminante*, an indication of the confusion in the circuit courts over when to apply the structural error or harmless error standard.

There are two ways in which the admission of the whites-only policy was structural error. *First*, as at least one circuit court has held, the injection of racially-biased arguments by the Government constitutes structural error because it taints the entire trial. *Second*, Mr. Bowman was effectively denied the right to voir dire the venire about their ability to judge him fairly because he relied on the district court judge's pretrial ruling that the whites-only policy would not be part of the case.

A. The Government's Injection of Racial Prejudice Into the Trial was Structural Error

The United States Court of Appeals for the Fourth Circuit has held that the injection of a race-based argument by the Government is a structural error requiring reversal. *Miller v. North Carolina*, 583 F.2d 701, 706-07 (2d Cir. 1978). In *Miller*, the defendants were three African-American men accused of raping a white woman. The Government essentially argued that no white woman would ever consent to having intercourse with an African-American man. *Id.* at 704. The Fourth Circuit first noted that "[n]othing is more fundamental to the provision for a fair trial than the right to an impartial jury" and that "[t]he law guarantees that every defendant may have his case decided strictly according to the evidence presented, not by extraneous matters or by the predilections of individual jurors." *Id.* at 706. The federal rules of evidence seek to "restrict the deliberations of jurors to that which is trustworthy, probative and relevant." *Id.* The court went on to explain that a racially-based argument "poses a serious threat to a fair trial" and "undermine[s] a jury's impartiality."

Id. at 708. Analogizing this error to other structural errors under *Chapman* (such as a coerced confession), the Fourth Circuit concluded that this type of error is one to which "the harmless error rule does not apply" because the "prejudice engendered is so great that automatic reversal is required." *Id.*; *see also United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2d Cir. 1973) (stating that where a prosecutor's remarks "introduced race prejudice into the trial," the defendant is denied "his constitutional right under the due process clause to a fair trial" though not reaching harmless error issue because evidence against defendant was so weak); *Soap v. Carter*, 632 F.2d 872, 877 (10th Cir. 1980) (Seymour, J., dissenting) (suggesting that a "prosecutor's appeal to racial prejudice can rise to an infirmity of [such a] magnitude" that automatic reversal is required), *cert. denied*, 451 U.S. 439 (1981).

The introduction of race-based arguments into a trial in order to prejudice the jury against the defendant is a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless error' standards." *Fulminante*, 499 U.S. at 309. The Government deliberately sought to inject Mr. Bowman's trial with an overlay of racial prejudice. This type of argument taints the jury's perception of Mr. Bowman and therefore the jury's verdict itself. This is the very definition of a structural error. It is not an error that can be weighed against the other evidence admitted against Mr. Bowman because it infected the framework of the trial. The Eleventh Circuit did not even consider this alternate avenue of analysis, suggesting that this case is a proper vehicle for this Court to amplify for the courts of appeals what is the standard of review when the Government introduces race-based arguments into a trial when such an argument is irrelevant to the charged offenses.

B. Mr. Bowman Did Not Conduct Voir Dire on Racial Prejudice Because He Believed the Whites-Only Policy Would Not Be an Issue in the Trial and This Was Structural Error

It was also structural error for the district court to have admitted the evidence of the Outlaws' racism because Mr. Bowman had relied on the district court's pretrial ruling that the whites-only policy was not going to be an issue in the trial and did not voir dire the venire on this issue. Therefore, the voir dire process was fundamentally unfair and infected the framework of the trial itself.

The right to voir dire the venire on areas of possible prejudice against the defendant is a key element for a fair trial. As this Court has held, "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). This Court has also held that where racial prejudice could be an issue in a trial, due process requires that the defendant "be permitted to have the jurors interrogated on the issue of racial bias." *Ham v. South Carolina*, 409 U.S. 524, 527 (1973). This Court in *Ham* reversed the defendant's conviction because he was not permitted to question the venire about racial prejudice and such prejudice was likely to be an issue during the trial. Id. at 529. Although the right to voir dire on racial prejudice is not absolute, if the issue will likely be raised during the trial, the Constitution requires "voir dire to include specific questioning about racial prejudice." *Ristiano v. Ross*, 424 U.S. 589, 595-96 (1976) (refusing to permit such questioning because defendant only argued that it be required because defendant was African American and victim was white).

In this case, the Eleventh Circuit ignored Mr. Bowman's argument that he had permitted an African American juror to be chosen for the jury because he had relied on the district

court judge's pretrial ruling that the whites-only policy would not be a part of the case. Br. of Appellant at 33. The situation in this case stands in marked contrast to that in the D.C. Circuit case discussed earlier, *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990), in which the court reversed the defendants' sentences based on the racist testimony of a police officer. In that case, the court *had permitted* voir dire "for possible bias against Jamaicans." Id. at 18; *see also Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d Cir. 1998) (holding that racial discrimination during voir dire is a structural error not subject to harmless error analysis). Despite the permitted voir dire on racial prejudice, the D.C. Circuit held that the injection of racial comments tainted the jury and required reversal. The situation for Mr. Bowman was substantially worse than for the defendants in *Doe* as he did not have the opportunity to question the venire about racial prejudice. Mr. Bowman was essentially denied the opportunity to voir dire the jurors about their potential biases concerning racist views. Therefore, although "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors," *Morgan*, 504 U.S. at 729, Mr. Bowman was effectively denied this right.

CONCLUSION

This case presents the important issue of how race-based evidentiary issues fit into this Court's harmless error framework. Mr. Bowman was denied a fair trial because the district court admitted the evidence of the Outlaws' whites-only policy. This evidence had no relevance to the charges against him because the Government did not charge him with any racially-motivated crimes. Evidence of a *defendant's* racism endangers the impartiality of the jury and taints its verdict, but the court below ignored relevant precedent and treated the evidence of racism as though it were any other type of irrelevant evidence rather than as the purely

inflammatory evidence that it was. Given the danger that the factfinder was not impartial, the admission of this evidence cannot be seen to be mere harmless error. Additionally, the court below failed to consider the possibility that this error was *structural*, placing it in a limited category of cases requiring automatic reversal. The Eleventh Circuit's blatant disregard of this alternate standard of review indicates confusion in the federal courts about *Arizona v. Fulminante*, confusion that a decision by this Court in the present case would eliminate.

Respectfully submitted,

RANDALL J. TURK
Counsel of Record
Sara E. Kropf
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400

HENRY GONZALEZ
Attorney-at-Law
708 E. Jackson Street
Tampa, Florida 33602

Counsel for Petitioner

March 24, 2003

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APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

United States of America, Plaintiff-Appellee,
v.
Harry Bowman, a.k.a. Taco, a.k.a. T, Defendant-Appellant.

No. 01-14305.

Aug. 20, 2002.

Appeal from the United States District Court for the Middle District of Florida.

Before BIRCH AND COX, Circuit Judges, and GEORGE,* District Judge.

PER CURIAM:

Harry Joseph Bowman, the international president of the Outlaws Motorcycle Club, was convicted of racketeering, conspiracy to murder, and various drug and firearm offenses. He was sentenced to life in prison. He appeals his convictions, contending that the district court erred by refusing to disclose the juror's names and by refusing to redact the Outlaws' Constitution to eliminate the whites-only membership policy. He also challenges the sufficiency of the evidence. We affirm.

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* Honorable Lloyd D. George, U.S. District Judge for the District of Nevada, sitting by designation.

I. BACKGROUND
A. FACTS
1. The Outlaws Motorcycle Club

The Outlaws Motorcycle Club was founded at a bar just outside of Chicago in 1935. It has since grown to include 64 chapters in the United States and chapters in eight other countries. The United States is divided into five regions, and each other country is considered a region. Chapter presidents report to their regional president. The regional presidents report to the international president.

Each chapter has a clubhouse. These clubhouses are used for "church meetings," parties, and privacy, and they are usually secured by concrete walls, steel doors, razor wire, guard dogs, and video surveillance.

The Outlaws profess to be "1%ers," or the one-percent of bikers who have rejected societal norms and dedicated their lives to the club. Membership is limited to men who own American-made motorcycles of a particular size, and membership dues are divided between the chapter and the region. A prospective member is first a "hang-around" or associate. He then becomes a probate and, finally, a patched member.

A patched member is entitled to wear a leather or denim vest bearing an Outlaws emblem, called "colors." The patch is surrounded by chapter and club membership information, called "rockers." These emblems are purchased directly from the international president. A patched member is also allowed to attend the weekly church meetings, while associates, probates, and "old ladies" wait outside. After being a member in good standing for a year, an Outlaw may wear a tattoo depicting the Outlaws emblem.

An Outlaw's tattoos can reflect other membership information as well. An Outlaw who commits murder, attempts murder, or explodes a bomb on behalf of the Outlaws is entitled to wear "lightning bolts," a Nazi-style "SS" tattoo. An Outlaw who has spent time in jail may receive an "LL" tattoo, which stands for "Lounge Lizard."

Membership in the Outlaws has its privileges. The Outlaws maintain a list of Lounge Lizards, or incarcerated Outlaws, and collect money on their behalf. Chapters also encourage the Lounge Lizards' "old ladies" and fellow Outlaws to send letters to imprisoned members.

While the Outlaws are allied with the Bandidos, a Southwestern motorcycle club, they have rivalries with several other clubs. Their dislike of Hell's Angels is expressed in their slogans "AHAMD," or "All Hell's Angels Must Die," and "ADIOS," or "Angel's Die in Outlaws States." They also dislike the Pagans and the Warlocks.

The Outlaws collect information on their rivalries with other clubs. They primarily collect newspaper clippings regarding incidents with other clubs. On occasion, though, an Outlaws member will bribe a law enforcement officer to obtain information on the location of a rival club's members. Outlaws also travel, at the club's direction, to the funerals of fellow bikers.

2. Harry Bowman

Harry "Taco" Bowman held various administrative positions within the Outlaws Motorcycle Club. He served as a regional president and national vice-president before becoming international president in 1984. Bowman conducted his presidential activities from the Outlaws clubhouse in Detroit, while living in an affluent Detroit suburb, sending his children to private schools, and driving

an armor-plated Cadillac. He served as international president for thirteen years, until 1997. As international president, Bowman handled matters large and small, from setting the Outlaws' policies regarding other biker gangs to monitoring the activities of members.

For most of Bowman's presidency, Wayne "Joe Black" Hicks was Bowman's right- hand man. In 1984, during the early part of his presidency, Bowman became concerned that a former Outlaw would reveal the whereabouts of an Outlaw fugitive. To alleviate his concerns, Bowman asked Hicks, then the vice president of the Toledo chapter, to kill the former Outlaw. Hicks was unable to complete this assignment because he failed to locate the former Outlaw. Nevertheless, impressed by Hicks's dedication, Bowman transferred Hicks to Florida so Hicks could help revive the Fort Lauderdale chapter. Hicks eventually became chapter president.

As chapter president, Hicks accompanied "Wild" Bill Pilgrim, Florida's regional president, to national meetings of regional presidents. At these meetings, held every couple of months, the regional presidents discussed chapter membership, the status of Lounge Lizards, the Outlaws' community activities, and the activities of rival clubs. Bowman, as international president, chaired these meetings, and the regional presidents were obligated to seek his permission before taking action against rival clubs.

Hicks became Florida's regional president in 1990. At a meeting with Bowman, Hicks reported that Alan "Greaser" Wolfe, an Outlaw, had testified before a grand jury. Bowman, who distributed Outlaws tee shirts bearing the slogan "snitches are a dying breed," told Hicks to kick Wolfe out of the club and otherwise take care of him. Hicks and another member revoked Wolfe's membership and beat him.

3. Murder of Raymond Chaffin

In the early 1990s, the Warlocks, another Florida club, allied with the Hell's Angels and began selling drugs on their behalf. This ignited a war between the Outlaws and the Warlocks. When the Outlaws learned that Raymond "Bear" Chaffin, a former member, was the leader of a Warlocks chapter in Edgewater, Bowman told Hicks to find Chaffin and kill him. Hicks asked Houston Murphy, the Fort Lauderdale president, to recommend an Outlaw who could gather intelligence on Chaffin. Murphy recommended Alex "Dirt" Ankerich, an Outlaws probate. Ankerich traveled to Edgewater and spent the night with Chaffin, who was unaware that Ankerich was affiliated with the Outlaws.

At the next regional presidents meeting, Hicks told Bowman about Ankerich's adventure, and Bowman asked Hicks if Ankerich could be trusted to kill Chaffin. Bowman then asked Ankerich if he was willing to do anything to become an Outlaw and told Ankerich that he could earn some lightning bolts. Ultimately, Ankerich and Murphy were directed to kill Chaffin and given a number to call when the murder was complete. Bowman and Hicks then agreed to present themselves in public to establish an alibi.

Murphy and Ankerich arrived in Edgewater on February 21, 1991. Murphy gave Ankerich a .22 pistol equipped with a silencer and told him to aim for Chaffin's head to facilitate the kill. Ankerich went into Chaffin's garage, shot Chaffin four times in the back of the head, and ran away. Murphy reported the murder to Hicks, and Hicks reported it to Bowman, who, in turn, complimented Hicks on his work. Murphy also told Ankerich that he had earned his patch and lightning bolts. Newspaper articles on Chaffin's murder were mailed to other chapters.

4. Kidnapping of Irwin Nissen

In March 1992, during Daytona Bike Week, Irwin "Hitler" Nissen, a former Outlaws probate, got into a fight with James "Moose" McLean, the president of the Outlaws' Atlanta chapter. Bowman heard about the fight and directed Murphy to bring Nissen to him. Christopher "Slasher" Maiale, another Outlaw, placed a lock on Nissen's motorcycle to prevent him from leaving.

The next morning, Dennis "Dog" Hall, an Outlaw, brought Nissen to Bowman's motel room. Bowman greeted Nissen by punching him in the face. Murphy then held Nissen while Bowman put a knife to Nissen's ear and threatened to kill him if he ever raised his hand against another Outlaws officer. Murphy and Maiale, at Bowman's direction, began beating and kicking Nissen until Bowman told them to get rid of him. Murphy then proceeded to push Nissen off of a three-story balcony, which resulted in severe injuries to Nissen, including a broken ankle.

5. Kidnapping of Kevin Talley

In 1993, a Florida Outlaws member named Kevin "Turbo" Talley was arrested in Canada while visiting an Outlaws chapter there. Talley was to be deported to Massachusetts, where a warrant for him was outstanding, but Canadian officials first had him sign a statement admitting that the Outlaws were a criminal enterprise. Incensed by Talley's action, Bowman ordered Hicks to bring Talley to Detroit and detain him there. Hicks called Talley in Massachusetts and told him to fly to Detroit. Two Outlaws, "Broda" and "Bolt," met Talley at the Detroit airport. They escorted Talley to the Detroit clubhouse and locked him inside for several days.

Eventually, Bowman and Hicks arrived in Detroit and met with Talley. They told Talley that they were upset that he signed the statement. After the meeting, Hicks told Bowman that he would handle the problem. Hicks sent Talley to Florida, where Hicks planned to beat up Talley and kick him out of the club. Believing he was in danger, Talley resigned his membership upon his return to Florida.

6. 1994

On New Year's Eve 1993, Bowman called a meeting of all Outlaws at a party in Fort Lauderdale. During the meeting, Bowman announced that the Outlaws would escalate their hostilities in 1994, showing no tolerance for Hell's Angels or their sympathizers. In the following year, Outlaws nationwide conducted an increased number of attacks on their rival clubs and circulated newspaper articles documenting these attacks.

a. The War Wagon Incident

In June 1994, numerous Outlaws descended on Gary, Indiana, to attend an event at a local speedway. This event was also customarily attended by the Invaders, another motorcycle club. The Outlaws suspected that the Invaders were affiliated with the Hell's Angels.

On the night before the event, Bowman met with attending Outlaw presidents. Randy "Mad" Yager, the president of the Gary Outlaws, also held a meeting with the attending Outlaws and announced that they were to attack the Invaders at the speedway. To carry out this attack, the Outlaws planned to use a "war wagon," or a vehicle modified with steel plating and several gun ports. The war wagon was equipped with firearms and other weapons to facilitate the attack.

The Outlaws drove the war wagon to the speedway, but no Invaders ever arrived. After the war wagon left, it was stopped by Gary police officers. The officers seized firearms, ammunition, and smoke grenades from inside the war wagon.

b. Hell's Henchmen

While visiting Chicago in the spring of 1994, Bowman complained about the presence of Hell's Henchmen in the area and the failure of the Chicago chapter president, Pete "Greased Lightning" Rogers, to do anything about it. Rogers, it turns out, was reluctant to take action for fear that it might draw the attention of federal authorities. Bowman decided to take matters into his own hands by ordering Hicks and Walter "Buffalo Wally" Posnjak to surveil the Hell's Henchmen clubhouse. Murphy also participated in this surveillance and, on one occasion, observed Hell's Angels memorabilia in the clubhouse. In September, Carl "Jay" Warneke, Yager, and another Outlaw met with Bowman at his Detroit residence, and Bowman gave them permission to bomb the clubhouse.

Then, in November, Outlaws Kevin "Spike" O'Neill and Raymond "Shemp" Morgan Jr. set off a car bomb outside of the Hell's Henchmen clubhouse. The bomb damaged nearby structures, parked cars, and commuters but failed to destroy the clubhouse. The Chicago Outlaws finished the job in December by dousing the clubhouse in gasoline and burning it down. The clubhouse was condemned and put up for sale, and the Outlaws celebrated by visiting the site and giving it "the one-finger salute."

c. Warlocks

Bowman, in 1994, also asked the Outlaws to do anything they could to destroy the Warlocks. Hicks asked Stephen

"DK" Lemunyon, a Daytona Outlaw, to determine how best to destroy the Warlocks clubhouse in Orlando. Lemunyon and Steve "Stevo" Hilton, another Outlaw, constructed a bomb, and Hicks kept Bowman informed of the operation. Meanwhile, several Daytona Outlaws kept an eye on the clubhouse.

Lemunyon, Hilton, and Louis Musher detonated the bomb in October 1994. Bowman told the Florida Outlaws that he was proud of their work. Bowman also told Hicks to keep up the good work and to continue to watch and kill the Warlocks.

A few months later, Lemunyon, Musher, Hilton, and Robert Gunther joined forces to plan another firebombing, this time of the Warlocks clubhouse in Brevard County. Again, Outlaws watched the clubhouse while Lemunyon constructed a bomb identical to the one used in Orlando. The plan was thwarted, however, when authorities arrested the Daytona Outlaws and, during a search of Lemunyon's residence, seized the firebomb.

d. Fifth Chapter Motorcycle Club

The Fifth Chapter Motorcycle Club was a family-oriented club made up of men and women who were recovering from substance-abuse problems. They sought to be neutral, maintaining good relationships with all clubs, and the Outlaws allowed them to exist in Florida, which was generally considered Outlaw turf. But the Outlaws also targeted the FCMC in 1994.

In September of that year, a Hell's Angel named Michael Quale was killed in an altercation with some Outlaws. At Quale's funeral, a photographer took a picture of an FCMC member hugging a Hell's Angel. Bowman believed that this hug was disrespectful to the Outlaws because one of their

own, "Buffalo Wally" Posnjak, had also been killed in the altercation. Bowman showed the photograph to Hicks and ordered Hicks to shut down the FCMC in Florida.

In December, Lemunyon invited members of the FCMC to the Outlaws clubhouse in Orlando. About fifteen members of the FCMC accepted the invitation and rode to Orlando. As they entered the compound, the FCMC members were searched by Outlaws.

Once inside, the members were seated at two picnic tables and surrounded by armed Outlaws. Lemunyon then announced that there was a problem, displayed the newspaper photograph, and began beating FCMC national president Mike Malone with a flashlight while the other FCMC members were held at gunpoint. Lemunyon told the FCMC that they could no longer exist and ordered them to remove any clothing that bore the FCMC logo. After the FCMC members complied with Lemunyon's instruction, the Outlaws began beating them as well.

After the beatings, the Outlaws allowed the FCMC members to wash themselves. They were told to return home without congregating or visiting hospitals. Once home, Lemunyon instructed, the FCMC members were to mail all of their FCMC memorabilia to the Outlaws. The FCMC members returned to their motorcycles to find that many of their personal belongings had been stolen.

e. Murder of Donald Fogg

At a 1994 meeting in Chicago, Bowman told Hicks and others that an Outlaw had become a snitch. Bowman said that the snitch would be killed and explained that the killing would be made to look like an enemy had done it. He also said that the murdered snitch would be given an Outlaw funeral.

A few weeks later, authorities found the body of Donald Fogg, an Outlaw, lying face down in the snow. Fogg had been shot in the head in a field near an Outlaws clubhouse. Fogg received an Outlaw funeral. At the funeral, a story was circulated that a policeman interested in Fogg's girlfriend had shot him, but none of the Outlaws seemed interested in revenge. Bowman later acknowledged that Fogg was the snitch he had targeted. Fogg, it turned out, had been talking to the police.

f. Hell's Angels

At a meeting in 1994, Outlaws regional president "Mad Mike" Markham was criticized for failing to take action against the Hell's Angels. Markham, however, was reluctant to take on the Hell's Angels because the two clubs had peacefully coexisted in his region. An Outlaw from Markham's region, Harold "Bullwinkle" Brewington, suggested an alternative: attack the Hell's Angels in California. Markham liked the idea and told Brewington that he would bring it up at the next regional presidents meeting.

At a meeting near the end of 1994, Bowman, apparently adopting Markham's idea, announced that the Outlaws would take the war against the Hell's Angels to California. Bowman planned to send a group of trustworthy Outlaws to California to conduct surveillance on, and possibly assassinate, either Sonny Barger, the international president of the Hell's Angels, or George Christie, a national officer. Ultimately, Murphy and Brewington were selected for the mission, but Murphy, uncomfortable with Brewington, went to California alone.

Murphy stayed in Ventura, California, for four days, locating and mapping out Christie's residence. He returned to Florida, but, after the Daytona Outlaws were arrested on

federal RICO charges, Bowman directed Murphy to bring the map to Tennessee. Murphy presented his report at a meeting in Tennessee, and Bowman thanked him for his service. Eventually, Bowman dispatched other Outlaws to follow up on Murphy's findings, but Christie was never harmed.

7. Other Activities

In addition to his managerial activities, Bowman also, at various times, used and distributed illegal drugs. He was generally accompanied by a bodyguard who carried a gun for him.

Bowman was indicted in 1997. The indictment was unsealed soon thereafter, but the FBI was unable to serve the indictment at Bowman's residence. Bowman then became a fugitive on the FBI's ten-most-wanted list. He was finally captured in 1999, while visiting his family in Sterling Heights, Michigan.

B. PROCEDURAL HISTORY

1. The Indictment

Bowman's indictment includes ten counts. Four counts allege violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Count One alleges that Bowman conspired to conduct and participate in the affairs of an enterprise affecting interstate commerce through a pattern of racketeering, in violation of 18 U.S.C. § 1962(d). This count includes seventeen alleged racketeering acts. Count Two alleges that Bowman in fact conducted or participated in these affairs, in violation of 18 U.S.C. § 1962(c). Count Four charges Bowman with threatening and assaulting members of the Fifth Chapter Motorcycle Club to maintain and increase his position in the RICO enterprise, in violation of 18 U.S.C. § 1959(a)(3) and (a)(4).

Count Five charges him with maintaining and increasing his position by conspiring to murder members of the Hell's Angels Motorcycle Club, in violation of 18 U.S.C. § 1959(a)(5).

Four counts charge Bowman with drug offenses. Count Three charges Bowman with conspiracy to possess with intent to distribute opium, cocaine, methamphetamine, marijuana, and Valium, in violation of 21 U.S.C. § 846. Count Six charges him with distributing methamphetamine, in violation of 21 U.S.C. § 841(a)(1). Count Seven charges him with distributing opium, and Count Eight charges him with distributing Valium.

Count Nine charges Bowman with destroying the Warlocks clubhouse in Orlando, in violation of 18 U.S.C. § 844(i). Count Ten charges Bowman, a convicted felon, with possessing a .45 caliber semiautomatic pistol.

2. Empaneling the Jury

Bowman proceeded to trial. Before empaneling the jury, the court sua sponte decided to keep the jury innominate.[1] by withholding their names, addresses, and places of employment. The court explained its decision in a written order, citing prior incidents of Outlaws attempting to interfere with judicial proceedings. (R.1-63.) Bowman objected, but the jurors remained innominate throughout the trial.

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[1] We will refer to the jury as "innominate" rather than "anonymous" because, after a thorough voir dire, the parties knew everything about the jurors except their names. *See United States v. Carpa,* 271 F.3d 962, 963 n. 1 (11th Cir.2001).

3. Trial and Motions for Judgment of Acquittal

At the close of the Government's case, Bowman moved for judgment of acquittal on all counts. The court granted the motion in part, entering judgment of acquittal on Count Seven and on two Racketeering Acts, numbers Five and Six. The court otherwise denied the motion. Bowman did not renew his motion at the close of all of the evidence.

The jury found Bowman guilty of Counts One through Six, Eight, and Ten and not guilty on Count Nine. The jury also found proved Racketeering Acts Two through Four and Seven through Seventeen. Bowman made a post-verdict motion for judgment of acquittal as to Count Four and Racketeering Acts Two, Eight, Thirteen, and Fifteen. (R.2-98.) The court granted the motion as to Racketeering Act Two but otherwise denied it.

Bowman stands convicted on Counts One, Two, Three, Four, Five, Six, Eight, and Ten. He also stands convicted of thirteen racketeering acts: Three is the murder of Raymond Chaffin; Four is the kidnapping of Irwin Nissen; Seven is the distribution of Valium; Eight is the kidnapping of Kevin Talley; Nine is the conspiracy to murder members of other motorcycle clubs; Ten is the bombing of the Warlocks clubhouse; Eleven is the bombing of the Hell's Henchmen clubhouse; Twelve is the conspiracy to destroy the Warlocks clubhouse in Brevard County; Thirteen is the assault on the Fifth Chapter Motorcycle Club; Fourteen is the conspiracy to murder members of the Warlocks; Fifteen is the murder of Don Fogg; Sixteen is the conspiracy to murder members of the Hell's Angels; and Seventeen is the distribution of various illegal substances.

4. Sentencing

Bowman was sentenced to concurrent terms of life imprisonment on Counts One and Two. He received twenty years each on Counts Three, Four, and Six, ten years each on Counts Five and Ten, and three years on Count Eight. These sentences were to run concurrently with his life sentence.

II. ISSUES ON APPEAL

Bowman raises three issues on appeal: (1) Whether the district court erred by denying his motion for judgment of acquittal based on insufficiency of the evidence; (2) Whether the district court abused its discretion by empaneling an innominate jury; and (3) Whether the district court abused its discretion by refusing to redact the whites-only statement in the Outlaws Constitution.

III. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

[1][2] Bowman made a post-verdict motion for judgment of acquittal, arguing that the evidence was not sufficient to support the jury's guilty verdicts. The district court denied the motion, and Bowman appeals. We review the denial of a motion for judgment of acquittal de novo. *United States v. Perez-Tosta,* 36 F.3d 1552, 1556 (11th Cir.1994). When the motion raises a challenge to the sufficiency of the evidence, we review the sufficiency of the evidence de novo, drawing

all reasonable inferences in the Government's favor. *Id.*[2] A review of the record indicates that the evidence against Bowman was sufficient on all counts of conviction, and only Count Four and Racketeering Acts Eight, Thirteen, and Fifteen warrant discussion.

[3] Count Four and Racketeering Act Thirteen charge Bowman with ordering the assault on members of the Fifth Chapter Motorcycle Club. In support of the count, the Government offered the testimony of Hicks, who was, for a time, Bowman's right-hand man. Hicks testified that, after Bowman saw a picture in the newspaper of an FCMC member hugging a Hell's Angel, Bowman was enraged and told Hicks to return to Florida. (R.15 at 121-22.) Upon Hicks's return to Florida, he was to meet with the FCMC, shove the newspaper in the president's mouth, and shut down the FCMC. (R.15 at 122.) Hicks understood "shut down" to mean the assaults and threats of violence that were issued to the FCMC. (R.15 at 124.) Although the assault was ultimately carried out by Lemunyon rather than Hicks, the jury could infer that Lemunyon was following Hicks's, and thus Bowman's, order. This evidence was sufficient to support the jury's verdict on this count.

[4] Racketeering Act Eight accuses Bowman of participating in the kidnapping of Kevin Talley. Bowman argues that there is no evidence indicating that he ordered the Outlaws to restrain Talley against his will. However, Murphy testified that Bowman issued an order that Talley be brought to Detroit and locked in the Detroit clubhouse.

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[2] The Government argues that, because the post-verdict motion challenged only a few counts of conviction, we should review the unchallenged counts for "a manifest miscarriage of justice." *United States v. Adams*, 91 F.3d 114, 116 (11th Cir.1996). In light of our conclusion that the evidence was sufficient on all counts, we need not be detained in a search for the appropriate standard of review.

(R.22 at 100.) Hicks and Talley also testified that Talley was indeed brought to the Detroit clubhouse and was not free to leave. (R.15 at 79; R.24 at 75-76.) This testimony is sufficient to support Bowman's conviction.

[5] Racketeering Act Fifteen concerns the murder of Don Fogg. Hicks testified that Bowman, at a presidents meeting, reported that there was a snitch among them and that the snitch would be killed. (R.15 at 124.) The murder would be staged to appear as if an enemy had committed it, and the Outlaws would hold a regular Outlaws funeral. (R.15 at 124-25.) Fogg was murdered, a story was circulated that an enemy had done it, and a regular funeral was held. (R.15 at 125-26.) Later, Bowman told Hicks that Fogg was the snitch he had mentioned at the meeting.(R.15 at 128.) The jury could reasonably infer from this evidence that Bowman ordered Fogg's murder.

Because the evidence was sufficient on all counts of conviction, we find Bowman's challenge to the district court's denial of his motion for judgment of acquittal to be without merit.

B. INNOMINATE JURY

[6] The district court sua sponte decided to empanel an innominate jury and entered an order detailing its reasons. Bowman objected to the use of an innominate jury and, on appeal, argues that the district court abused its discretion by using one in this case. The district court's decision to empanel an innominate jury is reviewed for an abuse of discretion. *United States v. Ross,* 33 F.3d 1507, 1519 (11th Cir.1994).

[7] The district court has the discretion to empanel an innominate jury upon a showing of a combination of several factors, including (1) the defendant's involvement in

organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that enhances the possibility that jurors' names may become public and expose them to intimidation or harassment. *Ross,* 33 F.3d at 1520.

[8] In this case, all of the *Ross* factors were present to some degree. Bowman was accused of being the international president of a motorcycle gang that had a history of violent conduct. The Outlaws, on several occasions, interfered with the judicial process by seeking to intimidate witnesses into not testifying against them and by observing and reporting on the testimony that witnesses did give. Bowman himself was accused of kidnapping Talley and murdering Don Fogg to punish them for their communication with law-enforcement authorities. Furthermore, Bowman was facing a life sentence, and his capture and trial had already garnered a significant amount of publicity. While Bowman argues that the Outlaws had no history of juror intimidation, jurors had been accosted by members of the news media in prior trials involving the Outlaws. Under these circumstances, the district court did not abuse its discretion by empaneling an innominate jury.

[9][10] Bowman argues that the district court nevertheless abused its discretion by failing to give the jury a special instruction regarding the unusual voir-dire procedure. Bowman is correct that the district court gave such an instruction in *Ross* and that the instruction was said to have eliminated any potential prejudice that the procedure might have caused in that case. *See Ross,* 33 F.3d at 1521-22. While the jury may have benefitted from a similar instruction in this case, the district court's failure to give the instruction does not warrant reversal. Because Bowman did not request

such an instruction, he waived any right he had to the instruction and may not be heard to complain now absent plain error. *See United States v. Zlatogur,* 271 F.3d 1025, 1030 (11th Cir.2001) (explaining that failure to request instruction precludes reversal absent plain error which "significantly and substantially" prejudices defendant); *United States v. Vario,* 943 F.2d 236, 241 (2d Cir.1991) (discussing waiver of instruction on anonymous jury where defendant failed to object to charge given). In any event, the evidence against Bowman was overwhelming, and the lack of an instruction did not affect his substantial rights.

C. REDACTION OF THE WHITES-ONLY POLICY

[11] The Outlaws Constitution states that only white males may be members. During its search of various Outlaws clubhouses, the FBI seized copies of the Outlaws Constitution, four of which contained this provision. In the first indictment against Bowman, the Government included the whites-only policy among its allegations. The court struck this allegation as irrelevant. At trial, the Government introduced the seized Constitutions, attempting to show a unity of purpose among the various Outlaws chapters. Bowman objected to the documents and asked the court to strike the whites-only policy from them. (R.10 at 174-75 & 202; R.12 at 12; R.29 at 6.) The court refused to do so. When the Government published the documents on an overhead projector at trial, the whites-only policy was visible to the jury. (R.10 at 177.) Bowman argues on appeal that the district court should have stricken the whites-only policy and that its admission was inflammatory and prejudicial. We review the district court's evidentiary rulings for an abuse of discretion. *United States v. Mills,* 138 F.3d 928, 935 (11th Cir. 1998).

[12] Bowman mounts his attack under Federal Rule of Evidence 403, which states that, "[a]lthough relevant,

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403. Since Bowman was not charged with any racially-motivated crimes, his allegiance to a racist organization is not relevant to his guilt or innocence in this case. Still, the repetition of the policy was not entirely irrelevant since it tended to show the uniformity of the Outlaws enterprise. But there was other evidence of this uniformity, as many of the constitutional provisions were repeated; each of the constitutions for instance, included the requirements that Outlaws must be twenty-one years-old and own their own motorcycles. Because it was cumulative, the evidence of the whites-only policy had limited probative value.

This limited probative value was, in our view, outweighed by the danger of unfair prejudice. The uneasy racial history of criminal law in the United States has yielded a simple rule-of-thumb: "There is no place in a criminal prosecution for gratuitous references to race, especially when a defendant's life hangs in the balance. Elementary concepts of equal protection and due process alike forbid a prosecutor to seek to procure a verdict on the basis of racial animosity." *Smith v. Farley,* 59 F.3d 659, 663 (7th Cir.1995). In this case, the Government, whose interest "is not that it shall win a case, but that justice shall be done," *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935), should have scrupulously avoided the possibility that the jury's verdict might be clouded by racial issues. Furthermore, the court could have, and should have, prevented the injection of racial issues by simply redacting the whites-only policy.

[13] Nevertheless, the whites-only policy comprised but a single phrase in a single sentence on each of four

documents admitted into evidence. Over the course of the trial, these four phrases became buried in the mountain of documentary evidence against Bowman, which included thousands of documents and photographs. Furthermore, over fifty witnesses testified regarding Bowman's criminal activity. Since the evidence against Bowman was overwhelming, and the whites-only policy was but a brief flicker in Bowman's month-long trial, the admission of the policy, while error, did not affect Bowman's substantial rights. *See* Fed.R.Crim.P. 52.

IV. CONCLUSION

Because we find no reversible error in Bowman's convictions, his convictions are affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14305-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARRY BOWMAN,
a.k.a. Taco, a.k.a. T,

Defendant-Appellant.

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On Appeal from the United States District Court for the Middle District of Florida

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BEFORE: BIRCH and COX, Circuit Judges, and GEORGE*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Harry Bowman is DENIED.

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* Honorable Lloyd D. George, U.S. District Judge for the District of Nevada, sitting by designation.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE
8/23/02

APPENDIX C

CONSTITUTIONAL PROVISIONS

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.